

Birch Run Welding & Fabricating, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Case 7-CA-21755

30 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 14 December 1983 Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Birch Run Welding & Fabricating, Inc., Birch Run, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. This case was tried at Burton, Michigan, on July 28 and September 14 and 15, 1983, pursuant to a charge filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) on February 15, 1983, and a complaint issued by the Regional Director for Region 7 of the Board on March 31, 1983, against Birch Run Welding (Respondent). The complaint alleges that 13 employees were laid off by Respondent on January 26, 1983, in retaliation for union organizing activities engaged in by employees of Respondent. The complaint also alleges coercive conduct by Respondent's supervisor and president in an incident occurring on January 26, 1983, which involved a single employee. Also alleged is coercive conduct by Frederick May Jr., an alleged "special agent" of Respondent, on the same date which involved another employee. Respondent's answer denies the agency status of May, but avers that it was incapable of knowing of May's conduct on January 26 since he is not an agent of Respondent but that "based on his statement already in the possession of the [Board] this charge is denied." The answer further denies the commission of any unfair labor practice.

All the parties were afforded the opportunity to adduce relevant and material evidence, to argue orally, and to file briefs. The General Counsel and Respondent

explicitly declined to argue orally on the grounds that they each preferred to and intended to file written briefs. Only Respondent filed a brief subsequent to the close of the hearing.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan. At all times material herein, Respondent has maintained its office and place of business at 11160 Dixie, in the city of Birch Run, and State of Michigan, herein called the Birch Run plant. Respondent is, and has been at all times material herein, engaged in the manufacture, sale, and distribution of fabricated machine parts and related products. During the year ending December 31, 1982, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, manufactured, sold, and distributed at its Birch Run, Michigan plant products valued in excess of \$50,000, which were shipped from said plant directly to points located outside the State of Michigan.

It is admitted, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent employed approximately 35-40 employees at its plant which was divided physically into a "front" and "back" shop. Repair and/or fabrication and welding occurred in the front shop on such items as tool racks, whereas a machine shop and assembly floor were located in the back shop where new die cast machines were built and old die cast machines were rebuilt pursuant to customers' orders.

No definitive evidence was adduced by either the General Counsel or Respondent as to exactly who was employed, where, on what shift, and in what position at the times material herein. It is thus necessary to glean from the uncontradicted testimony of several employees a reconstruction of Respondent's work force as of the critical month of January 1983 and thereafter.

In the last 6 months of 1982, two or three employees worked on the first shift under admitted Supervisor Gerald Johnson in the back shop machine shop, i.e., lathe operator William Humes and two other employees, including John Clark and an unidentified employee who engaged in boring mill or drill presswork. The second-shift machine shop under Supervisor Ted Dahl included Michael Hogan on the lathe, Pat Reittenbach on boring mill work, and Lance Metiva on drill presswork. Also

employed in the back shop but on the assembly floor first shift were Christopher Van Ness (who had engaged in truckdriving duties, layout work, and assignments covering the entire shop) and Rick Reikowski, an "eye burner operator" and occasional short run truckdriver. Alan Zabarczy testified that he worked "on and off" throughout 1982 in the front and back shop and that in January 1982 he was working on the assembly floor in the back shop on the first shift with "probably" seven other employees, including Walt Morris, Rick Kuhr, employees "Dick and Ray," and Supervisor Thomas Goodreau. It is not clear how many employees were utilized in the assembly on the second-shift floor in January 1983. Employee Humes estimated that the entire plant day shift consisted of 20-25 employees, and the entire night shift consisted of 12-14 employees.

Employed in the front-shop first shift in 1982 under the supervision of admitted Supervisor George Anscomb were blueprint layout fitter Timothy Schmidt, welder Daniel Oberg, painter-welder-local truckdriver Kenneth Parlberg, truckdriver Randy Wade, rack welder Joe Kamrade, and an indeterminate number of other unidentified employees. Oberg was employed on the second shift in the front shop twice during 1982. From June 1982 until September he worked on the second shift on fabrication duties with a group of about six employees, including Jerry Berg, Jose Aguirre, and Rudy (last name unknown). In September, Oberg was laid off and later in November recalled to the first shift by Anscomb where he performed rack welding duties with Joe Kamrade. After 3 weeks on the day shift in December, Anscomb asked Oberg if he "would start a second shift" in the weld rack area. Work in that area, i.e., repairing and rebuilding tool racks for customer orders, had not been done previously on the second shift. Pursuant to a discussion between Anscomb and Oberg, certain employees were assigned to the second shift and trained and instructed by Oberg with respect to rack welding duties they performed with him on the second shift. Of these were included Don Yaklin, Anthony Sparck, Jeffrey Benham, Tim Altman, and Jose Antonio Aguirre. Respondent contends that Oberg was a supervisor within the meaning of the Act. The General Counsel contends that he was an employee and thus entitled to the Act's protection. Also on the night shift in the back shop were Mike Barske and possibly a Ron Lonsway. At the top of Respondent's plant supervisory hierarchy was President Harold Johnson.

B. Union Activity

There is no evidence that Respondent has had any history of collective bargaining. Furthermore, according to the testimony of employees, there had been no prior overt attempt to organize for a union. The employee most actively engaged in the union organizing effort of late 1982 was lathe operator Humes. In October, he conversed with fellow employees Morris, Schmidt, and Clark in general terms about the idea of contacting the Union. Such a contact was later made in October with union agent Koster and a meeting was set for mid-November with him. Koster and Humes discussed organizing procedures. Humes relayed this information to the

above three employees and Humes also talked to employees Reittenbach, Hogan, and Metiva in the shop in general terms about the possibility of organizing for a union. They all decided to take no action until after Christmas. On or about the end of December or January 1, Humes again discussed unionization with about 10 employees, some of whom were employed on the second shift. Included in these discussions were Zabarczy, Van Ness, Wade, and Ray Marrietta (job unknown). Their response was to the effect that they desired more information.

Subsequently, Humes arranged an employee meeting with Koster on Sunday, January 16, at a union office in the city of Saginaw, about 10-15 miles from Birch Run. Humes notified his coworkers in the shop to spread word of the meeting. About 10 employees attended that meeting, some of whom agreed to sign written union representation authorizations, i.e., union cards and some of whom desired to talk first with other employees. It was therefore decided to set another meeting for Sunday, January 23. Such a meeting in fact took place between Koster, Humes, and about 18-20 employees at a union office in Bridgeport, an immediate suburb of Saginaw. Union cards were signed by, according to Humes' generalized and conclusionary testimony, a majority of unnamed employees who had attended. Some employees also executed a written authorization to be designated as members of the union organizing committee. Humes executed both authorizations.

The General Counsel did not adduce into evidence the authorization cards, nor the identity of card signers. Koster told the employees that he would send a letter to Respondent which he expected would be delivered no later than Wednesday, January 26, and that the employees should start organizing activities on that date. In fact, no overt prounion display took place in the shop before January 26. Humes testified that the foregoing union activities were engaged in secretly.

Birch Run fell within the geographical jurisdiction of the Union's regional headquarters in Grand Rapids, 140 miles away, and it was therefore under the cognizance of International representative Curtis Hatfield. Pursuant to a discussion with Koster, Hatfield sent a certified letter dated January 24, addressed to "Mr. Harold Baldorf, Board Chairman" at Respondent's Birch Run address. The letter was returned unopened and bore the notation: "Refused 1-25-83 D. Litson [presumably a postal employee]." Also noted thereon were the notations "1-25-83, 1st Notice. 2-2-83, 2nd notice." The letter, *inter alia*, advised that the following named employees had agreed to use their names as members of the organizing committee: Aguirre, Altman, Barske, Hogan, Humes, Lonsway, Metiva, Oberg, Parlberg, Reittenbach, Anthony W. Sparck Jr., and Zabarczy.

No testimony was adduced by adverse witnesses or otherwise as to Respondent's awareness of the attempted delivery of that letter, or as to its direct knowledge of its contents. Hatfield testified that he based his information as to Baldorf's status on a representation by Koster. Baldorf is not named in the complaint. Humes testified that there were two "Mr. Baldorf's," and further testified

without detail, context, or foundation that he had seen Harold Baldorf at some previous undisclosed date and time at some undisclosed place in Respondent's shop. What Baldorf was doing in Respondent's shop must be left to the imagination. Truckdriver Parlberg testified in obscure, conclusionary terms and without foundation that he had observed a "Mr. Baldorf" and another person named "Hal" who "work" in an office at Saginaw Control and Engineering Co., a customer of Respondent and where Frederick May, the alleged special agent herein, is the apparent plant manager. May's status will be discussed more fully hereafter in regard to alleged 8(a)(1) violations.

Truckdriver Parlberg testified cryptically, without context, that he received some sort of check from "Harold Baldorf," but did not know whether or not it was attributed to work he performed for Saginaw control.

There is no further testimony or other evidence in the record with respect to these Baldorf's, i.e., their precise identity, job function, employment status, physical description, or relationship to Respondent and/or Saginaw Control and Engineering Co. There is no evidence to establish an inference that the Mr. Baldorf observed at Saginaw Control and Engineering Co. is the same Mr. Baldorf seen by Humes in the Respondent's plant.

C. Pre-January 26 Economic Conditions

The evidence of Respondent's business status must be gleaned from the testimony of nine employee witnesses as to their direct observations. Two of those witnesses were called by Respondent. Their testimony was not rebutted. Respondent offered no other testimony or other evidence in this proceeding, and presented no testimony from Harold Johnson who was present throughout the trial, nor did it produce the testimony of any supervisor. There was no significant conflict between Respondent's employee witnesses and those of the General Counsel.

As of January 26, Respondent's business was depressed from the normal level. An indeterminate number of employees were already on layoff status. Several employees had to be reassigned to job functions other than that which they normally performed because of the lack of work. General Counsel witness Schmidt testified that the flow of layout work in the front shop had diminished prior to January 26 and that in consequence he had been assigned to the back shop to work as a rack assembler although he was still paid as a layout worker. In cross-examination, a Respondent witness, Van Ness, testified that he worked in a variety of jobs throughout the shop and from his observation the amount of work in general had diminished. Respondent witness Benham testified that the flow of rack assembly work had diminished.

Although there is testimony on which it can be concluded that work remained to be done in the shop as of January 26, it appears that a substantial diminution of work had occurred over an indeterminate period of time. No one testified with any specificity as to the cessation of any work order on the afternoon of January 26.

It is also clear from the testimony of the General Counsel's witnesses that Respondent has had a past history of lack of work layoffs of varying degrees of severity,

i.e., a few days to that of several months, and involving a large proportion of the work force. Parlberg, a truckdriver, was laid off due to a lack of work in 1979 for 2 weeks. He was also laid off in April 1980 for 3-4 weeks. Schmidt, an employee since 1978, had been laid off several times for periods of 3 days, 1 week, and 2 weeks. Aguirre, an employee since 1980, testified that during his tenure there had been numerous employees laid off and that he had been laid off from December 1981 until April of 1982, during which time he drew unemployment compensation.

As noted above, Oberg, an employee since 1979, had been laid off from February through March 1982 and from September 1982 to November 1982. Zabarcki was employed since 1978. He recalls several layoffs of a couple of weeks duration. Specifically, he testified that a massive layoff occurred in the early spring of 1982 pursuant to an announcement made to the assembled employees where the poor status of the business was explained. Zabarcki testified that the meeting involved "mainly just the front shop." He explained, however, "The back shop was just about wiped [out] too." As a result he was laid off from 2 to 4 weeks.

Furthermore, from the testimony of General Counsel witnesses, it is established that Respondent had no layoff policy and did not utilize seniority. Generally, the second shift was laid off in deference to the first shift. Furthermore, if an employee had no further work on a particular job that he had completed he was laid off while a less senior worker was retained to continue performing available work on his job. The only time tenure played any significant role is when temporary workers were hired to complete work on a rush job. At the conclusion of that specific job those newly hired workers were laid off. Although it is clear that some employees were recalled and at the time of layoff were told that they were to be recalled, there is no evidence that Respondent recalled every laid-off employee in preference to hiring new employees. Nor is there evidence that Respondent followed seniority in recalling laid-off workers. Nor is there any evidence as to whether or not some employees were laid off and told at the time of their layoff that they ought not expect to be recalled either for poor workmanship or lack of expectancy of sufficient work or any other reason.

D. The January 25 and 26 Meetings

Harold Johnson conducted a meeting of all second-shift employees on the evening of January 25, and of all first-shift employees at the commencement of the shift in the morning shortly after 7 a.m. on January 26. Johnson explained in general terms the status of the Employer's business to the employees, i.e., that it was not good, that it was slow, that there was no overtime, that the market for its die cast machine product was being flooded by machines from bankrupt companies, that its customers were going bankrupt and not paying their bills, that low or no profit business is being accepted or sought, i.e., rack work merely to keep a "core" of good workers together, that Foreman Anscomb is taking to the road to solicit new business but the "prospects" were not good

or were "pretty bad," that the future was unforeseeable, that Respondent's creditor bank had been and was then in continuing contact with Respondent concerning the state of its finances, i.e., the bank was "on [his] back" and had recommended that Respondent should lay off 30 percent of its employees, that he was afraid of the bank's "pulling his credit," that he should have laid off employees a couple of weeks before this, but that Respondent was attempting to and had hopes or desires to prevent further layoffs and, with the cooperation of employees, will interchange employees in job functions to prevent layoffs, and will try to keep as many employees working as possible, that a nationwide trucker strike and an increase in state taxes were "hurting the business," that operating costs were up, that there have been no raises or paid vacations for 6 months and will be none in the foreseeable future because of insufficient income to pay for them, that there was no money for repairs of machines in its shop, that although he had eight die cast machines in the shop to be worked on there were no buyers for those machines, that Respondent's business was "holding water" and he did not expect it to "fold," that laid-off employees would be recalled before new employees were rehired in the event of an upturn in business.

Without elaboration, General Counsel witness Zabacki testified that Johnson's speech delivered to employees that preceded the massive layoff of early 1982 was "kind of similar" in content to that delivered by Johnson on January 26. Zabacki also testified that Johnson addressed the employees before the early spring of 1982 mass layoffs and told them that "they were barely making it" and that "they had just the nucleus of the shop working, and they were just trying to hold things together, and that [Anscomb] was on the road mostly . . . looking for work." Similarly, and despite such assurances, layoffs followed that speech. According to Zabacki, it was not clear how soon those layoffs followed. It was also testified to by Zabacki that Johnson continually complained about the poor state of Respondent's business during Zabacki's entire tenure.

E. The Alleged Interrogation and Solicitation of Grievances

Humes testified credibly and without contradiction to the following incidents on January 26. Johnson's speech lasted for about 35 minutes. Shortly after Humes returned to his station, Supervisor Harold Johnson approached him and promised him a pay raise he had requested in November because of his good work performance on condition he did not disclose it to other employees, saying, "I know you have a hard time keeping silent about things like that." Humes promised silence. One half-hour later, Supervisor Gerald Johnson approached Humes at his work station and stated that he did not understand how he was supposed to tell employees of long tenure that they could not have a pay raise when there was sufficient work being performed on the plant floor. He instructed Humes to accompany him to a confrontation with Manager Harold Johnson in the conference room, where Gerald Johnson asked Harold Johnson for an explanation. There Harold Johnson had before him what appeared to be a cost ledger sheet. Harold Johnson

explained Respondent's total labor costs and stated that Respondent had lost \$20,000 the month before. Humes interrupted and stated that it was time to stop "beating around the bush . . . I think you guys know there's an organizing drive going on in the shop right now for the U.A.W. and I don't know why you have me up here showing me this stuff, but I think it's for this reason, and if you don't know it, you do now." Both Johnsons denied any such knowledge. Harold Johnson then stated, "why, what did the guys want?" Humes immediately responded, "Well, I can't speak for everyone, but most of the guys want something different. Most of the guys with a lot of time in here want to keep their jobs. Take John Clark, for instance. He's been here longer than I have, and chances are you would get rid of a guy like him before you would a guy like me [with lesser seniority]." Harold Johnson responded, "you're right. I would get rid of a guy like him before I would you." Humes added that the employees also desired a clean lunch area. Johnson stated, "Well, why can't we get together and talk about these things?" Humes responded, "Well, Harold, frankly, I think the guys are scared . . . of you. To be honest with you . . . I don't believe any of them believe a word you said at the meeting, and they're all scared to come up and talk to you. The only reason I'm up here is because the fact is I can talk to you and I like you."¹ With respect to seniority, Harold Johnson stated, "Seniority has to be agreed on. Both sides have to agree on it. Most shops aren't working on a seniority basis now a days. They just don't want it." Humes said, "you're right, you need an agreement." Then Harold Johnson stated, "In the end, who wins. The employees go out on strike. The Company doesn't get their work done. In the end who wins?" Humes repeated, "you're right, you do need an agreement." The desk telephone rang. Harold Johnson spoke on the telephone, hung up, and said that he and "Mr. Baldorf" had to go to the bank or that they had an appointment at the bank. Humes could not be certain whether Johnson referred to "Dave Baldorf," "Harold Baldorf," or "Mr. Baldorf." Harold Johnson then thanked Humes, and that is the extent of the alleged interrogation, solicitation of, and promise to remedy grievances.

Humes then was escorted back to his work station by Supervisor Gerald Johnson who insisted to Humes, "I didn't know there was an organizing drive on, Bill." Humes said, "Well, well we tried to keep it as a secret," and "well, you know now." Gerald Johnson then said, "It doesn't matter to me either way. It doesn't matter to me. I've been through this before."

F. Status of Alleged Special Agent Frederick May Jr.

Respondent had several customers, one of which, the Saginaw Engineering and Control Co. (herein S.E.), manufactured electrical panel control boxes for presses and machines. Truckdriver Parlberg testified that from his observation Frederick May Jr. appeared to be the plant manager of S.E. Parlberg made frequent deliveries

¹ This testimony suggests that Humes instigated the confrontation contrary to his testimony that Gerald Johnson initiated the meeting.

to S.E. The totality of the General Counsel's evidence of the status of May and S.E.'s relationship to Respondent consists of Parlberg's testimony, which in turn is derived from his casual observations. Two persons, appearing to be truckdrivers of S.E., on unspecified occasions were observed in Respondent's plant receiving interstate delivery instructions from Johnson or Anscomb as to Respondent's product, and loading and presumably delivering Respondent's product either with Respondent's tractor-trailer or an S.E. tractor, or picking up racks from unspecified places to be brought into Respondent's plant for repair, or repaired racks to be delivered back to S.E.

On indeterminate occasions, when Parlberg had made a "run" to S.E., in order to pick up unspecified parts that were being worked on by S.E., those parts were not ready for loading. At those unspecified dates, Parlberg was instructed by Anscomb to assist S.E. "to get them done," and "help" May "run it," e.g., install door handles on control boxes. It is not clear how these parts were related to Respondent's products. Parlberg acquiesced in these instructions on no less than six unspecified occasions pursuant to a "standing rule from George Anscomb" to "oblige" May and to do what is asked of him when at the S.E. plant. This instruction was given at the outset of Parlberg's employment. On some of these occasions May instructed Parlberg to make certain Michigan deliveries for S.E., along with Respondent deliveries. On these such occasions Parlberg telephoned Anscomb for approval because the requested S.E. delivery was out of his way. Each time he was given authorization to make the delivery. The third time Parlberg asked Anscomb whether in the future he needed to telephone for approval and was told to comply with the S.E. request if it were "within reason" but that he should not "take off to Pittsburgh or something." That is the extent of evidence concerning the relationship of May and/or S.E. to Respondent. There existed some mutual accommodation with respect to the use of two S.E. drivers, and Parlberg. The extent of this accommodation is unclear. The details of the arrangement are unknown, e.g., with what frequency and under what circumstances did this occur, who compensated whom and for what, was there special compensation for such services, were they merely ad hoc extra services tendered to valued customers, or were they done to satisfy emergency situations? Parlberg testified that neither May nor Respondent represented May to him as having complete authority over him. It is implicit in Parlberg's testimony that some discretion was to be used by Parlberg as to the extent of services he was to oblige May with, and that he must be authorized by Anscomb when in doubt, particularly as to any long distance deliveries.

G. Conduct of May on the Morning of January 26

Immediately after the meeting of January 26, Parlberg proceeded to his toolbox to prepare for some painting work he had been engaged in. Anscomb approached him and instructed him to take his truck on a run which involved a stop at Mets & Merrill to pick up a blueprint to be delivered to May at S.E. The nature of the parts to be made by S.E. pursuant to the blueprint is not disclosed. Parlberg, having obtained that blueprint, proceeded to

S.E. He proceeded to May's office where he observed "a few gentlemen" speaking to May. He identified one of them as "Hal" and one as a "Baldorf," who both "work in the office out there." As Parlberg entered the office, the conversation ceased. He handed the blueprint to May who, with customary brusque jocularity, received it by asking what the "hell" it was. Parlberg testified that he proceeded to explain and as he did so the other individuals departed. Parlberg and May proceeded to the S.E. receiving area of that plant. May thereupon asked him what was "going on" at Respondent's plant and, to negative responses, stated that he had heard that "you guys are organizing a union." To a further negative response, May asked, "Is that lathe guy the one organizing it . . . I think his name is Bill?" Upon a denial of any knowledge May asked whether Parlberg was at a union meeting the previous night, at which "that guy Bill" was present. Parlberg testified:

And, uh, then [May] said they tried to pull that union stuff on us out here in Saginaw about three years ago. And we should can the whole group is what he said. We should can the whole group of them. And, uh, start it all over again. And he said I sure hope that you are not in on it because you will not have a job for long and anybody connected with it won't.

Parlberg left the S.E. shop about 10:15 a.m. and then proceeded to telephone Anscomb to ascertain whether he had further "stops" in Saginaw. Subsequently, pursuant to telephone instructions, he made further "stops" at Wilson Machine Co. and "a couple of other places." He returned to Respondent's plant about 11:45 a.m. and then took his lunch at the normal lunch period of 12-12:30, after which Anscomb told him that he was to make 12 to 15 more stops that afternoon. Despite his protestation of ignorance of union activities to May, Parlberg had attended two union meetings, including the January 23 union meeting, and was named as an organizing committee member in the undelivered union letter addressed to Baldorf. Parlberg signed a union representation authorization card and a bargaining committee authorization card on January 23.

H. The January 26 Noon Distribution and Display of Union Insignia

During the noon lunch period on January 26, Humes and Clark, pursuant to their usual practice, ate their lunch in Clark's automobile parked in Respondent's plant parking lot. Shortly before the end of the lunch period Humes retrieved UAW campaign paraphernalia from his car, i.e., buttons and shirt pocket penholder and pencilholder inserts, and writing pens. One type of button, 2-1/4 inches in diameter, bore the legend "Organizing Committee" about the circumference and "Join-UAW-Vote" in the center. A second button, 1-1/2 inches in diameter, contained representation of two crossed American flags and the words "Vote UAW." The pocket penholder measured 3-1/4 inches by 5-3/4 inches and when inserted in a shirt of a coat chest pocket left exposed a 2-1/4 by 3-inch section on which was centered a 1-1/4

inch insignia which contained "UAW" in 1/4-inch high letters. Under that insignia appeared the legend "UAW Organizing Department" in 1/8-inch high letters. The material had been previously supplied by Koster to Humes at his home. In the parking lot, while still on lunch break, Humes encountered and gave one each of the pens, buttons, and pocket penholders to Zabarczy and Schmidt. Humes did not give any campaign material to Clark that day. Clark did not display any on his person that day. Upon returning to his duty station, Humes carried the union campaign materials in an envelope and placed them in his toolbox. From Humes' own testimony, I conclude that he did not place any insignia on his clothing. Humes distributed no further union paraphernalia that afternoon, and the material remained in his locker until 3:30 p.m. No union materials had been distributed prior to noon of January 26. At 3:30 p.m., at the end of the workday, Humes gave the union materials to second-shift employee Hogan who had attended the January 23 union meeting.

Zabarczy placed an "Organizing Committee" button on his shirt, and inserted the pocket penholder into his work pocket and wore these items for the balance of the day. Schmidt positioned a "Vote UAW" button on his jacket lapel and inserted the pocket penholder in his shirt pocket. Schmidt testified, without any detail, that he believed that he signed a UAW organizing committee authorization card on January 25 or 26. It is not clear when or where this occurred. He attended no union meetings prior to January 26. Schmidt hung his jacket at his locker and wore only the union pocket holder insert on his person in the shop that afternoon. Thus, of about 20-25 employees on the day shift on January 26, only 2 wore observable union insignia. The wearing of such insignia was the extent of any overt union activities that had occurred in the plant building up to that time. There is no evidence of supervisory presence at or surveillance of the parking lot during lunch break.

1. Alleged Special Agent May's Conduct of the Afternoon of January 26

After lunch, Parlberg had to pick up certain material at Mets & Merrill and also "pads for steering gear racks" at S.E. He therefore had to visit S.E. again at an undisclosed time. While Parlberg assisted May in finishing the pads so that they could be loaded onto Respondent's truck, they engaged in a conversation. It is not clear whether these pads were purchased by Respondent for use on racks produced by Respondent for another customer or whether S.E. was performing work for Respondent pursuant to subcontract or just what part these pads played in the relationship between S.E. and Respondent, or whether S.E. was acting as a supplier to Respondent.

While assisting May in finishing work on the pads, Parlberg was questioned in a jocular way by May as to where his union button was, and he was asked to obtain one for May who expressed the thought that it would be funny for him to wear one at S.E. Parlberg insisted that he was ignorant of any union buttons. According to Parlberg, May "was joking around pretty" much," but then in a serious tone asked: "the shop [was] cleared out

after lunch wasn't it?" Parlberg asked the meaning of the remark and May responded, "all them people wearing union buttons all got laid off and fired, didn't they?" Parlberg responded, "well, when I left there everybody was there." May stated, "well they won't be there when you get back." The pads were then finished and loaded onto Respondent's truck. Before they finished, however, May told Parlberg, "Don't bother getting me one of those buttons cause I hate to see you lose your job over—you know—going to get one of those buttons for me . . . just forget about it. I was just joking with you." At an undisclosed time of day Parlberg left the S.E. plant and made his remaining runs and did not return to Respondent's plant until 5:30 p.m. It is not clear, but it appears that the pads retrieved from S.E. were delivered to Respondent.

J. The Layoffs of January 26

About 3 p.m., Anscomb approached Schmidt at the latter's work station, displayed blueprints to him, and stated that he wanted Schmidt to prepare a parts list pursuant to those blueprints for the second shift to assemble them for a small job to commence the next day. (That total job was estimated by Schmidt to take several days. Schmidt's own function would be limited to several work hours.) Anscomb stated that he wanted to get the jobs out of the way "because Friday they were going to lay off some employees." At that point the two men, who had been standing side by side and leaning over examining blueprints on a table, straightened up and faced each other. After Anscomb looked up at Schmidt, Schmidt stopped speaking (they had just commenced to examine and discuss the details of the blueprints), he stated while maintaining eye-to-eye contact: "I will be with you in just a minute." Anscomb then walked off. After about 10 or 15 minutes, Anscomb returned, told Schmidt that "starting at 3:30 p.m." (normal shift ending) he was to be laid off, and then immediately walked off again. Schmidt, who is about 8 inches taller than Anscomb, was wearing the union pocket penholder insert in his shirt pocket throughout the conversation. Schmidt had no conversation with any Respondent agent concerning his union activity or any union activity. There is no evidence that he actually executed his union card before he was laid off. Schmidt testified that prior to January 26 there was no appearance in the shop of any union activity, insignia, or otherwise. About 2 weeks later, subsequent to his layoff, Schmidt received a letter from Respondent stating that he was not going to be recalled and that he ought to seek work elsewhere. He had not received such a letter subsequent to his previous layoffs. He has not been recalled.

Humes testified that at 3 p.m. he was working at his machine on a job that remained to be completed and that he was approached by Supervisor Goodreau and Gerald Johnson. Goodreau told him that he was included in a layoff and "it looks like it's going to be an extensive one so you might as well clean out your [toolbox] and take them [sic] with you." Humes then emptied his toolbox of Respondent owned tooling and placed it in a box held by Gerald Johnson. He cleaned his area, shut off his ma-

chine, and departed at 3:30 p.m. Humes observed the same encounter between the two foremen and other employees, and heard them tell Clark that he was also laid off. Humes, an employee since April 1981, had never previously been laid off by Respondent despite its layoff history which included the layoff of other machinists. In mid-April, Humes telephoned Harold Johnson and inquired of the state of Respondent's business which was stated as "pretty much the same." Humes informed Johnson that he had another job at a furniture store but would return to Respondent if needed. Johnson responded, "okay." On one other occasion in February 1983 Humes retrieved his last paycheck in a visit to the plant. When he attempted to await other employees in the parking lot he was ordered by Anscomb to leave and was told, "We don't want you talking to our people on our property." There is no evidence as to Respondent's policy, if any, regarding access to its parking lot by laid-off employees or other visitors.

By letter dated January 31, from Harold Johnson, Humes was advised that Respondent did not foresee "any quantities" of customer purchases, that the current lack of business prospects was unprecedented in the history of Respondent, and that the market was glutted with its products and finally stated to Humes:

To be fair to you and your family we strongly suggest you seek employment wherever possible. We have no reason to believe you will ever be recalled to Birch Run Welding.

Humes has not been recalled.

Zabarcki testified that at 3 p.m. he was in the process of working on an uncompleted job of rebuilding a die cast machine. He observed the supervisors encounter Humes and Clark, and observed them cleaning out their toolboxes. He then asked Goodreau when he would be asked to clean out his own toolbox and was told, "right now." He testified on further questioning by counsel for the General Counsel that Goodreau also stated, "you're being laid off because of lack of work. It's all part of the game." Although Zabarcki's pretrial investigation affidavit did not contain the reference to "It's all part of the game," his testimony remained uncontradicted. Inasmuch as I cannot find his testimony inherently not credible by virtue of other internal inconsistencies or demeanor, I credit him. Zabarcki received a letter dated January 31 from Harold Johnson advising him that the possibilities of future orders were "very bad" with respect to both the fabricating shop and die cast shop, that the welding business is as bad as it had ever been, etc., and it was therefore "strongly" suggested that he seek employment elsewhere because Respondent had "no reason to believe" that he would ever be recalled. Subsequent to past layoffs, Zabarcki had not received such a letter. He was not since recalled.

Parlberg, on his return to the shop, was informed by second-shift employee Benham that all union organizing employees had been laid off and that Anscomb was waiting for Parlberg to lay him off. Parlberg therefore proceeded toward Anscomb who, however, walked right past him without saying a word and without responding

to Parlberg's question as to what to enter on his timecard. Parlberg then proceeded to fill out his timecard. Anscomb walked up and told him that he was laid off and immediately turned and walked away. In addition to truckdriving on January 26, Parlberg had been engaged in painting duties and there were unpainted racks waiting to be painted by him. He has not been recalled. Employees on the day shift who were also laid off on January 26 were Clark and Van Ness, who were not known to be union sympathizers. Of those first-shift employees who had attended union meetings but were not laid off were Walt Morris and Ray Marrietta who attended only the first meeting but not the January 23 meeting.

With respect to the night shift, Oberg had attended union meetings in January where, at one of these meetings, he received both authorization forms which he subsequently executed on an unspecified date. Oberg was named in the Union's undelivered letter as an organizing committee member. On the afternoon of January 26, Oberg reported somewhat early of the 3:30 p.m. shift start. He proceeded to assemble his tools and learned from a conversation with several employees that some first-shift employees had been laid off. Second-shift worker Mike Hogan had received the union paraphernalia from Humes at 3:30 p.m. Hogan had attended the two prior union meetings and was named in the union letter as a union organizing committee member. Although Hogan's testimony was silent as to his own union activities, Oberg testified that he had observed Hogan distributing union materials to a few employees at an undisclosed location probably during the second-shift lunch period. According to Oberg, he observed second-shift employee Yaklin place a union button on his hat. Oberg also obtained a UAW button from Hogan at the same time. Also, with some uncertainty, Oberg testified that Hogan gave a union button to employee Sparck. Oberg placed the "VOTE UAW" button on his coat and the penholder pocket insert and pen into his toolbox, and the other "organizing committee" button into his pocket, placed his jacket with the button attached on a rod near his toolbox, and proceeded to his adjacent work station. According to Oberg and employee Aguirre, Yaklin was the only second-shift employee that wore a visible union insignia for the balance of the afternoon on his clothing. Oberg testified that the button was exposed on his own jacket as it hung near his work station.

Second-shift employee Aguirre testified that the evening one-half hour lunch period occurred at 7 or 7:30 p.m., and the employees ate in their cars in the parking lot. According to him about 7:50 p.m., Hogan distributed the union campaign materials to Sparck and to himself in the parking lot. According to Aguirre, he placed the pen pocket holder into his shirt pocket and one of the buttons onto his coat which he wore in the parking lot. For the balance of the evening, Aguirre placed his jacket on a hook near his locker, 15 feet from his work station, and wore coveralls, which obscured the pocket insert. According to Aguirre, night-shift employees whom he observed and who did not wear insignia on duty were Oberg, Sparck, and Benham. He was unable to observe

employees who worked in the back area, e.g., Reittenbach.

Second-shift employee Benham, a Respondent witness, testified that on January 26 he had been aware of outside union activities, i.e., he had refused invitations to attend union meetings, but he was unable to observe from his remote painting room location union insignia on the night of January 26. However, without explanation, Benham testified that he was aware on that night that although not worn, UAW insignia had been distributed to employees. Clearly, the distribution of union insignia became rumored through the plant.

Although Supervisor Anscomb does not ordinarily appear in the shop until 5 a.m., on the night of January 26 he appeared in the plant and walked about, chatted with employees at their work station, and departed. At 11 p.m., he appeared and announced in individual confrontations with the night-shift employees that the second shift was being shut down and that second-shift employees were laid off.

It is Oberg's uncontradicted testimony that Anscomb, during the layoff notification encounter, engaged in the following colloquy: In response to Oberg's query "Aren't we making enough?" and "Well, don't we have enough work," Anscomb stated, "Yes, we're making enough money," and "Yes, we have plenty of work." In response to Oberg's further question, "Well then, how come we're being laid off?" Anscomb, without explanation, stated, "It's all part of the game."

Aguirre testified, without contradiction, that during his layoff confrontation he asked Anscomb why he was being laid off in light of Johnson's speech the night before wherein Johnson indicated that he expected to be able to keep employees working, and that Anscomb told him that he really did not know why the layoff occurred and "that is just the way it goes." The testimony of Aguirre and Oberg is not so inherently improbable, nor is their demeanor so deficient, that I must find their uncontradicted testimony unreliable. I therefore credit their uncontradicted testimony.

Subsequent to the layoff of January 26, Oberg received a letter from Respondent which indicated the lack of a foreseeable recall. He has not been recalled since. Aguirre is silent as to the receipt of any past layoff by letters.

Employee Benham was laid off on January 26. It is not clear whether he received any postlayoff letters from Respondent. Benham testified that about 10 second-shift employees were laid off on January 26. Hogan and Lance Metiva, second-shift machine shop employees, were not laid off. They were transferred to the day shift. Metiva's union activities are not clear, but he is one of those persons named by the Union as a member of the organizing committee. Hogan instructed Metiva with respect to some boring millwork to be done on the day shift. Hogan assumed the day-shift lathe operator job vacated by the layoff of Humes, i.e., operation of the long lathe. Hogan had had only 2 or 3 months' experience operating the long lathe on the night shift, whereas Humes, who had entered on duty in April 1981, had worked on the long lathe since September 1981. It was Humes who originally instructed Hogan in the operation of the long

lathe. (Hogan's seniority is unclear.) On the night shift Hogan utilized only half his worktime on the long lathe, whereas Humes operated the lathe 90 percent of his time. Hogan testified that from his direct observation, Hume produced three times more items on that lathe than Hogan was capable of processing. It does not appear that any other second-shift employees were spared the layoff, but the record is not clear. Thus Oberg observed (but did not hear) Anscomb confront "everybody" before he was confronted with a layoff notification. However, he only named the following: Yaklin, Sparck, Aguirre, and Altman. Oberg, on inquiring in his confrontation, was told that Benham (who had departed for a personal emergency) was also laid off. Aguirre testified that the entire shift was laid off. The complaint alleges, and Respondent admits, that the following night-shift employees were laid off on January 26: Altman, Reittenbach, Yaklin, and Sparck, as well as Benham, Oberg, and Aguirre. The Complaint is silent as to the other night-shift employees.

Of the entire night shift, only one employee wore observable union insignia in the plant on his person, e.g., Yaklin. Of those laid off, the following attended union meetings, according to Humes' testimony: Reittenbach, Metiva, and Hogan. Also, of those laid off, the following were named by the Union in its undelivered letter to Baldorf as members of the organizing committee: Aguirre, Altman, Garske [Barske], Hogan, Kevin Lonsway, Metiva, Oberg, Reittenbach, and Sparck.

Thus, although the bulk of the union organizing committee is purported to have centered on the night shift, there is no direct evidence, except as delineated above, of their actual union activities, or Respondent's awareness or suspicions of them. The complaint does not allege Barske, Metiva, or Lonsway, but does allege Sparck, Van Ness, Clark, and Benham as discriminatees.

Of the second shift, the only employee who had no connection to the union organizing efforts was Benham. Although Yaklin wore insignia on January 26, there is no other evidence of union activities engaged in by him nor any prior expressions of union sympathies from him.

K. Post-January 26 Events

Hogan testified credibly without contradiction that on January 27 the machine shop complement consisted only of himself and Metiva. Thereafter, he instructed Foreman Gerald Johnson how to operate a boring mill and former Second-Shift Foreman Ted Dahl how to operate a lathe. It appears from Hogan's testimony that Dahl reported at 3 p.m. to take over and complete the lathe work at Hogan's shift end. Hogan testified that on January 26 "a lot of lathe" work remained. It is not clear whether or not other persons were employed on the second shift after January 26. Prior to the January 26 layoff, the plant worked 5 days a week. After January 26, according to Hogan, frequently it operated 6 days a week, including Saturday. Two or three months after January 26, Hogan observed that two new assemblers were hired and six new machine shop workers were hired.

Aguirre testified that after 2 months he was recalled to his old job of repairing racks but on the day shift, where Benham and Altman had preceded him in being recalled, but he did not observe Yaklin or Sparck having been recalled. (It appears that Sparck and Yaklin and any other laid-off employees were not recalled.)

With respect to the first-shift employees that were laid off, Van Ness was recalled to drive a truck. Before the layoff, Parlberg drove the "stake rack" truck whereas Van Ness drove the "semi," and performed layout, and assembly work, as well as bricklaying. After being recalled, Van Ness again drove the "semi" truck and experienced no further layoffs. Van Ness, a Respondent witness, testified that several new persons appeared in Respondent's shop to "help us out in the die cast assembly." It is Van Ness' testimony that these new employees were "hired in," either permanently or temporarily, to help out on a certain undisclosed die cast job with which those persons have had past experience, but of a type which is new to Respondent's shop.

IV. CONCLUSIONS

A. *The 8(a)(1) Allegations*

The complaint alleges that in January Harold and Gerald Johnson coercively interrogated an employee (Humes) regarding "why Respondent's employees supported the Union." The evidence, however, reveals that it was Humes who brashly disclosed to Respondent the fact that union organizing was taking place and that Harold Johnson, in an apparent spontaneous reaction to that bold disclosure, asked, "why, what do you guys want?" Humes seized the opportunity to express his opinion of what generally motivated the employees to seek union representation. Humes himself contributed to a continuation of the discussion by challenging and questioning Respondent's layoff policy. Humes clearly was not intimidated, and although actual intimidation is no sine qua non to a violation of law, it is indicative of a context which was lacking in coercive tendency. Humes fearlessly and eagerly pursued the conversation. Johnson's query was general and not pursued. Furthermore, Gerald Johnson immediately thereafter implicitly assured Humes that union activities would entail no adverse consequence. I therefore am unable to conclude that any coercive interrogation occurred.

The complaint alleges that in the foregoing incident Respondent's same agents solicited and promised to remedy employee grievances. I find, however, that at most Harold Johnson uttered a rhetorical question (more of an expression or desire) as to why management and employees could not talk together about employee complaints. This conduct falls far short of soliciting grievances but, more importantly, in no way can be construed as constituting a promise to remedy specific complaints. I therefore find this allegation without merit.

With respect to the conduct of alleged special agent Frederick May Jr., little need be said, because I conclude that the General Counsel has adduced insufficient unambiguous, specific, detailed, and probative evidence of the status of Frederick May Jr. At most, the General Counsel has adduced some evidence that S.E. was rendered

accommodation by Respondent with respect to the services of its truckdriver which were loaned on a few occasions for limited functions, and that S.E., in turn, loaned the services of one or two truckdrivers to Respondent. It is not alleged, and there is no evidence, that S.E. was a joint employer with Respondent. Further, May's status with respect to S.E. is itself unclear. The General Counsel has tantalized us with the specter of the peripatetic Mr. Baldorf, or two Mr. Baldorfs, but has failed to link S.E. or May to Respondent via a particular Mr. Baldorf. Accordingly, I find these allegations relating to Mr. May to be without merit.

B. *The 8(a)(3) Allegations*

The General Counsel's position with respect to the discrimination allegation, as with all allegations, must be derived from surmise, as no statement of position was tendered to me at hearing or in brief.

The usual theory of unlawful discrimination is premised on knowledge, hostility of, and retaliatory reaction to specific employees because of their specific union activities. Respondent makes strong argument of the fact that there is no pattern of individually directed retaliatory treatment herein, i.e., not all union sympathizers were laid off, nonunion sympathizers were laid off, and some union sympathizers were recalled while some nonunion sympathizers have not been recalled. The record, as discussed above, reveals that the General Counsel has failed to adduce direct evidence of Respondent knowledge of the union activities of specific employees. At the hearing, counsel for the General Counsel suggested that inferences of knowledge and/or hostility can be derived from the nonacceptance by Respondent of the Union's letter addressed to Harold Baldorf. I disagree. Numerous reasons can be conjured up for the lack of acceptance of certified mail from the Union. Most importantly, Baldorf's status as agent of Respondent was never proven nor even alleged. Baldorf's lack of relationship to the Respondent alone may account for nonacceptance. In light of the secrecy of the union activities and their occurrence, for the most part in another city, I cannot infer that Respondent must have known of each employee's union activities by virtue of the size of its plant (which, in fact, was not a situs for all the activity), nor the size of the community. Of course, knowledge evidently became widespread to the extent that May knew of them, but this occurred after Humes disclosed it to the Johnsons. It is a matter of conjecture where May obtained his information.

From a reading of the General Counsel's pleadings, however, I do not conclude that the General Counsel premised the theory of prosecution on discriminatory conduct in retaliation for specific activities of specific individuals. The complaint alleges that 13 employees were laid off in retaliation for union activities "engaged in by employees," i.e., not necessarily those employees. In other words, it appears to be the General Counsel's position that Respondent engaged in a general retaliation against its employees because of the union activities of some of its employees in order to frustrate all union activities, even though some of those employees caught in

the retaliatory net were not involved in union activities. That is to say the Respondent promised to extend itself and try to keep the remaining employees together by seeking out work of little profit if they in turn were co-operative. Having been rewarded with unionization, Respondent retaliated with a general layoff. Also, it might be argued that the Respondent knowingly included in its retaliatory net innocent nonunionists in order to disguise its motivation.

Regardless of which theory the General Counsel is espousing, an analysis must be made as to whether the General Counsel has proven the case.

In a recent landmark decision, the Board stated in the *Wright Line* case:²

[W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Very recently, the Supreme Court answered affirmatively the question of "whether the burden placed on the employer in *Wright Line* is consistent with Sec. 8(a)(1) and 8(a)(3) as well as with Sec. 10(c) of the [Act] which provides that the Board must prove an unlawful labor practice by a 'preponderance of the evidence'" [citation of Sec. 10(c) omitted].³

In the *Wright Line* case, the General Counsel had adduced evidence of employer knowledge and hostility directed to an employee with an admirable work record because of that employee's active role in a union organizing campaign, suspect timing of the adverse action, the departure from past disciplinary practice, and the lack of significant impact of the reason advanced for the cause of adverse action toward the employee. In the *Transportation Management* case, a similar factual pattern involved a departure from past practice. A variety of factors can thus give rise to an inference of unlawful motivation sufficient to establish a prima facie case. In cases involving alleged discriminatory group or individual layoffs, the Board has frequently cited the factors of suspect timing coupled with hostility toward employee representation⁴ in support of a finding of a prima facie case.

In the absence of evidence of expressed union animus, a prima facie case might not be shown where the evidence gives rise to, at most, a suspicion, i.e., the proffered reason for the layoff, lack of work, was contradicted by the hiring of new employees to perform the work

of the laid-off employees.⁵ However, even in the absence of overtly expressed union hostility, the sequence of events may be such as to preclude as improbable the conclusion that the timing of a layoff and union activity was a mere coincidence, and that a causal relationship must necessarily be inferred and thus establish a prima facie showing of unlawful motivation.⁶

The reason for their layoff generally proffered to the employees in correspondence was economics. The General Counsel, in the face of evidence of an economic deterioration of Respondent's business, has adduced the evidence tending to give rise to an inference that the layoff was effectuated at least in part as a result of Respondent's awareness of union organizing activities which preceded it by a few hours. The crucial question is whether the evidence sufficiently supports such inference in order to carry the General Counsel's burden of proof under *Wright Line*, supra.

The Respondent confidently concluded that the General Counsel has not met that burden, and therefore adduced the most meager evidence in its defense, i.e., two employees' generalized observation of the state of the flow of work in the plant. Clearly, if the General Counsel has demonstrated a prima facie showing of unlawful motivation, the Respondent has failed to rebut it by cogent, credible, detailed, nonconclusionary testimony and/or documented evidence.⁷

For the following reasons, I conclude that the General Counsel had adduced sufficient evidence to have shifted the burden of proof to the Respondent. Although the General Counsel's case is weakened by the absence of direct evidence of union animus, I conclude that the sequence of events is such as to necessitate the inference that such animus was at least in part a motivating factor. First, the Respondent, although not shown to be frothing with antiunion vituperation, clearly is shown to have been adverse to the unionization of its employees. I conclude this based on Manager Johnson's confrontation with Humes. The thrust of that conversation, although not coercive, revealed that Johnson, i.e., Respondent, like its competitors, was adverse to a seniority policy which was a main unionization goal. Johnson suggested and appeared to believe that a prospect of unionization was strife, i.e., strikes, loss of pay, and loss of profits. Johnson expressed the preference that employees and management ought to talk out their problems and implied that they do so without unionization. Thus I conclude that Respondent was not merely indifferent to the news of its employees' organizing efforts but rather was adverse to it.

Secondly, although the General Counsel did not adduce evidence, by way of adverse witnesses or subpoenaed documentation, of the actual state of Respondent's business as of 3:30 p.m., January 26, it did adduce

² *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

³ *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469, 97 LC ¶ 10,164 (1983).

⁴ See, for example, *Balch Pontiac Buick*, 260 NLRB 458, 463 (1982); *Dutch Boy, Inc.*, 262 NLRB 4 (1982); *Acme Die Casting Corp.*, 262 NLRB 777 (1982); *Rain-Ware*, 263 NLRB 50 (1982).

⁵ *Delta Hosiery*, 259 NLRB 1005, 1010 (1982), re layoff of employee McGrady.

⁶ *Martin City Ready Mix*, 264 NLRB 450 (1982).

⁷ Compare *Saginaw Aggregates*, 191 NLRB 553 (1971); *Cashway Lumber*, 196 NLRB 1135 (1972); *St. Regis Paper Co.*, 247 NLRB 745 (1980); *Suburban Ford*, 248 NLRB 364 (1980). *Martin City Ready Mix*, supra.

enough evidence on which to conclude that immediately before Respondent acquired knowledge of union organizing, i.e., Humes' disclosure, Respondent at least was of a mind that despite economic adversity business was good enough to retain the then present complement of workers as a core of desirable employees even if that meant accepting low profit work orders. To be sure Johnson in his speech to employees did not guarantee continued employment and did warn of the unforeseeable events, etc., but the clear import of his speech was that economics certainly were stable enough to sustain the work force beyond 3:30 p.m. on January 26 and that low profit work would be sought just to keep them retained. Although work had declined, employees had been shifted about and were engaged in uncompleted tasks when they were notified of the layoff. Although Respondent's past practices of effectuating layoffs were not governed by seniority, it is uncontroverted that employees, regardless of seniority, were retained to complete the job they were involved in prior to being laid off and in preference to more senior workers. The General Counsel has adduced sufficient evidence to demonstrate that there was indeed immediate observable work available to laid-off workers. There is no contrary evidence that work ran out for any of the laid-off workers prior to 3:30 p.m. Rather they left behind incomplete work. Thus, for example, employee Schmidt was given instructions to set up a job for the second shift. He was terminated before he could complete his task, and almost immediately after his union insignia was exposed to the very foreman who was instructing him on that job. Moreover, the second shift was laid off hours later, despite the existence of that unfinished job.

Employee Humes' treatment is also revelatory. In the morning of January 26, he was promised a raise because of his excellent abilities. Indeed, he had never been laid off despite his lower seniority. In the confrontation with Johnson, his retention in spite of seniority was assured by Johnson. After his disclosure to Johnson, he was, within several hours, laid off despite the fact that he was in the middle of a job. Clearly, there was enough work for him in the morning to have warranted a promise of a raise. But at 3:30 p.m. he was notified of a layoff and subsequently informed that there was no prospect of his recall, as were several other laid-off employees. Although the night-shift layoffs appeared to comport with the general past practice of laying off night-shift employees first, Humes' layoff and replacement by a night-shift employee appears to run contrary to that practice, and contrary to the past favored treatment of Humes, the more experienced long lathe operator.

Also, contrary to past practice, employees who had been subject to previous layoffs and who had been subsequently recalled and who had been told that they were to be retained as a nucleus of desirable workers were now urged by unprecedented written notice to look for work elsewhere.

At 7 a.m. on January 26, the employees were told that if everyone pitched in and cooperated, the Respondent expected to not only avoid a layoff but looked forward to rehiring laid-off employees in preference to hiring new workers. There is uncontradicted testimony that six

to eight new employees, either temporary or permanent, have been observed performing job functions in the plant subsequent to the layoff but despite the nonrecall of all laid-off workers, including the previously highly regarded Humes. Furthermore, the workweek was thereafter expanded.

Although past history discloses numerous layoffs, and even discloses that Respondent similarly addressed its employees in early or spring 1982, as it later did on January 26, 1983, and yet laid off employees in 1982, there is no past history disclosing such erratic behavior by Respondent where expectations of employment are given and shattered within a matter of a few hours.

Thus the General Counsel has demonstrated that on the morning of January 26 employees were at work performing tasks before them, that some assurances of employment were given them, and that before the day was out, and those tasks were uncompleted, Respondent reversed its expressed intentions and suddenly executed a massive layoff. Moreover, in executing that layoff its supervisor and agent, Anscomb, informed one employee that the layoff was not economically motivated, but rather was part of a "game," and told another employee that he did not know the reason for the layoff and then suggested that it was not for economic reasons. Supervisor Goodreau, although stating that the layoff was purportedly for lack of work, also said it was "part of the game." Respondent, by this conduct alone, created a situation whereby the employees could only conclude that the reason for the layoffs was union activities as is evidenced by the rumor which spread and was propagated by the elusive Mr. May and the night-shift employees, one of whom encountered truckdriver Parlborg with it.

I conclude that the General Counsel has adduced sufficient evidence of a sequence of events that give rise to the conclusion that something happened shortly after the morning meeting that precipitated the layoffs and that it was not a sudden evaporation of work that was unforeseeable a few hours earlier. The General Counsel has demonstrated that awareness of union activity by Respondent, which was adverse to it, occurred that morning after the speech. Under this proven factual context, I conclude that it is improbable that the sequence of events was mere happenstance, and that therefore an inference of causation must be made, and that the inference is sufficiently strong as to have obliged Respondent to have moved forward with some cogent and competent rebutting explanation which it could have done so with its representative who was present at the trial or by some documentary evidence. It having failed to do so, I conclude that the General Counsel has established that the layoff of employees on January 26 was motivated at least in part by the union activities of some of the employees, and that there is no evidence that Respondent would have laid off all or any of them regardless of those union activities. Accordingly, I find that the General Counsel has proven the 8(a)(3) and derivative 8(a)(1) allegations of the complaint to be meritorious.

The final question to be resolved is whether or not Oberg is to be excluded from a remedial Order and his layoff found nondiscriminatory on the grounds that he is

a supervisor within the meaning of the Act and thereby not entitled to its protection.

Although Anscomb sought Oberg's opinion of potential night-shift candidates, Oberg merely rendered a universally favorable opinion on all of them. It is not established that Anscomb relied on any of Oberg's opinions without recourse to independent investigation. The work on the night shift involved the repair and assembly of a toolrack. Each employee at the beginning of each shift selected a rack from a stack of racks, or proceeded to his previously selected rack. Each employee's workplace on the floor was selected by the employee and became recognized as his area. The work itself was routine and repetitive. Oberg acted as the more experienced lead person, and advised and instructed the employees based on his superior skills until they became proficient in their own right. Oberg relayed to the workers a quota which was mechanically derived from instructions Oberg received from John Anscomb. His only involvement in discipline occurred when he was queried as to observing a certain employee abusing a forklift truck. Oberg reported what he saw. The employee was disciplined. Oberg did not participate in the decision to discipline, nor in the decision as to the nature of discipline. He was told by Anscomb that in the future if he saw any employee abusing a forklift truck, i.e., racing it about, that he should tell the employee to go home. Such conduct did not occur again. Clearly then, the ambit of his participation in maintaining discipline among rack assembly workers was limited to the precise instruction for a precise type of palpable misconduct. In four or five instances, employees who departed early because of personal need informed him. On one occasion when work ran out, Oberg relayed Anscomb's instruction to the employees to leave. Although Oberg testified that he assumed that he had authority to send an employee home early without checking with Anscomb, it is not clear that the authority entailed the use of independent judgment or whether it merely involved a decision automatically to be effectuated pursuant to predetermined conditions, i.e., illness, lack of work, lack of heat, etc. On one occasion Anscomb asked Oberg whether a certain new worker had shown up one day. Oberg reported that he had not. Anscomb, without consulting Oberg as to discipline, terminated that employee.

Although Anscomb instructed Oberg as to the production quota and told him that he was "in charge" and responsible to maintain it, there is no evidence that Oberg was given explicit authority or instruction on how to accomplish this end. Oberg testified without contradiction that he in turn relayed the quota and exhorted and encouraged the other employees to accomplish it and they always managed to do so. Although the other rack assemblers joked and teased him as being a supervisor, there is no clear evidence that he had or exercised independent judgment in disciplining or threatening to discipline employees in the event that they did not meet the pre-set quota.

Oberg, as did other employees, on occasion accepted receipt of incoming shipments and locked the plant door at night.

It is not clear whether any other supervisor was present in the rack assembly area at night. Oberg testified without contradiction that the machine shop foreman, Dahl, frequently inspected the assembly area throughout the night and made general inquiries as to whether everything was "all right." Dahl's functions and authorities were not alleged or litigated.

I conclude that Oberg did not exercise independent judgment and discretion with respect to any matter affecting the employment status, pay, or significant working conditions of any employee. He relayed instructions and decisions made by Anscomb. Dahl, an apparent supervisor, was present but, even in his absence, the work was simple and routine and required no supervisory presence. Although Oberg was clothed with some ostensible authority, the exercise of such was of a mechanical nature. Accordingly, I conclude that Oberg's authority was not of that kind as to deprive him of the status of an employee protected by the Act.⁸

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act by laying off those employees named in paragraph 12 of the complaint on January 26, 1983, in retaliation for the activities of some of its employees on behalf of the Union and in order to discourage the union activities of all of its employees.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully laid off certain employees, I shall recommend that Respondent be ordered to offer them reinstatement to their former or substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings that they may have suffered thereby in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).⁹ I shall also recommend that Respondent expunge from their records any reference to the unlawful layoffs on January 26, 1983, and notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against them.

⁸ See *Hot Bagels & Donuts*, 227 NLRB 1597 (1977), and cases cited on p. 1602 in my decision of a similar situation involving a night manager.

⁹ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On the foregoing findings of fact and conclusions of law and on the entire record, I make the following recommended¹⁰

ORDER

The Respondent, Birch Run Welding & Fabricating, Inc., Birch Run, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act by laying off employees in retaliation for the activities of some of its employees on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer any of the following named employees who have not been recalled reinstatement to their former or substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them all whole for any loss of pay they may have suffered as a result of the January 26, 1983 layoffs computed in the manner set forth in the section of this decision entitled "The Remedy":

William Humes	Alan Zabacki
Timothy Schmidt	Timothy Altman
John Clark	Chris Van Ness
Patrick Reittenbach	Kenneth Parlberg
Donald Yaklin	Jose Aguirre
Daniel Oberg	Jeffrey Benham
Anthony Sparck	

(b) Expunge from its files any reference to the layoffs of the above-named employees and notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll and all other records required to ascertain the amount of any backpay due under the terms of this Order.

(d) Post at its Birch Run, Michigan facility copies of the attached notice marked "Appendix."¹¹ Copies of said

notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act by laying off employees in retaliation for the activities of some of our employees on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer to any of the following employees who have not been recalled reinstatement to their former or substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them all whole for any loss of pay they may have suffered as a result of the discriminatory layoffs of January 26, 1983: William Humes, Alan Zabacki, Timothy Schmidt, Timothy Altman, John Clark, Chris Van Ness, Patrick Reittenbach, Kenneth Parlberg, Donald Yaklin, Jose Aguirre, Daniel Oberg, Jeffrey Benham, and Anthony Sparck.

WE WILL expunge from our files any reference to the layoffs of the above-named employees on January 26, and WE WILL notify them that this has been done and

¹⁰ If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹¹ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that evidence of this unlawful action will not be used as a basis for future personnel actions against them.

BIRCH RUN WELDING & FABRICATING,
INC.